IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 114

JUAN POSADAS, JR., Collector of Internal Revenue of the Philippine Islands, *Petitioner*,

vs.

THE NATIONAL CITY BANK OF NEW YORK, *Respondent*.

REPLY BRIEF FOR PETITIONER

I

Respondent's brief is noteworthy for what it does not say. It attempts no direct answer to petitioner's arguments. It attempts merely to ignore them or to evade the necessary consequences.

It makes no direct reply whatever to Point I of our brief (pp. 11-34) that: "Neither the taxing section of the National Bank Act nor any other part of that Act, nor Section 25 of the Federal Reserve Act, runs to the Philippine Islands". Impliedly it admits the correctness of our position. It does not question the correctness of our Point II (*brief*, pp. 33-34) that: "There is no federal statute limiting the general taxing power of the insular government

over Philippine branches of national banks of the United States, or over any other banks in those Islands, except the provision of Section 3 of the Organic Act that 'the rule of taxation in said Islands shall be uniform' ". Manifestly that statement cannot be questioned. It attempts no direct reply to Point III of our brief (pp. 34-42) that: "There is no implied prohibition preventing the Philippine government from levying these taxes, or collecting them"; nor does it question our arguments under that Point, which compel that conclusion. It attempts merely to say (*Respondent's Brief*, pp. 7-10) that the implied consent of the Congress or the intention of the Congress implied from all its Acts is not enough, but that the Congress, as to this particular matter, may act only by "express" enactment in so many words;—an impossible position (*infra*, pp. 10-12). It makes no reply to Point IV (pp. 43-44) of our brief that: "The Congress, by Section 6 of the present Organic Act for the Philippines, expressly ratified the sections of the Philippine Administrative Code under which the taxes here involved were imposed." *Respondent has nothing whatever to say in answer to that proposition,* which is believed in itself to be conclusive in favor of the validity of these taxes. And it does not directly question the correctness of Point V of our brief (pp. 44-46) that: "There is no federal statute authorizing the establishment of branches of United States national banks in the Philippine Islands".

II

Respondent says (*Brief*, p. 3) that "*the question of whether the National Bank Act or the Federal Reserve Act extend to the Philippine Islands is not involved*". Substantially the brief admits that neither of those Acts runs to the Philippines. But Respondent says (*brief*, p. 18):

> "It has no bearing whatever on the question whether, by Section 25 of the Federal Reserve Act, *the charter powers of national banks,* having the required amount

of capital, were extended so as to authorize them to open branches in dependencies of the United States including the Philippine Islands." (*Italics are respondent's own*)

Non sequitur. It is immaterial from what particular angle the effect of Section 25 of the Federal Reserve Act be viewed, and whether or not it be looked at as an extension of the charter powers of national banks, or as a grant of governmental power to the Federal Reserve Board with a corresponding command to the governments of the "insular possessions" to respect that power,—or from either or all of these angles, or in any other way. In any event, it expresses the measure of the power of the Federal Reserve Board to grant the license, and, correspondingly, the measure of the power of the bank to act under it and to establish branch banks outside of the continental United States. Except for that section there is no such power, either as a charter power of the bank, or as a governmental power of the Federal Reserve Board. Except for that section the charter powers of the bank do not extend to the opening or maintenance of any branch outside of the particular State (or Territory) within whose limits the parent bank is located. It necessarily follows that, since Section 25 of the Federal Reserve Act does not run to the Philippines, therefore it does not contain any grant to the bank of any extension of its charter powers to open or to maintain any branches there, any more than it contains any grant of governmental power to the Federal Reserve Board to give any permit or license for the maintenance of any such branch there. It is as broad as it is long.

III

And the same thing applies to respondent's contention (*Brief*, pp. 3, 18), that the question whether the National Bank Act extends to the Philippine Islands "*is not involved*", or "*has no bearing whatever on the ques-*

tion here presented'', of the power of the Philippine government to tax these banks located at Manila and Cebu in the Islands. Respondent does not explain how it arrives at that conclusion. The question whether or not the taxing section of the National Bank Act, or Section 25 of the Federal Reserve Act, runs to the Philippine Islands is in fact the gist of this whole case. If they ran there, then, of course, as this court held in the Puerto Rican case, *Domenech* vs. *National City Bank*, 294 U. S. 199, last February, it would follow that these banks at Manila and Cebu would really be, legally, branches of a national bank of the United States, and would be taxable only under the taxing section of the National Bank Act; and the taxing powers given by the Congress by the Organic Act to the Philippine Legislature would be limited by the express provisions enacted by the Congress itself in the taxing section of the National Bank Act. But, since neither the Federal Reserve Act nor the National Bank Act extends to the Philippines, there is no legal basis whatever for considering those Manila and Cebu banks as being in any statutory sense ''branches'' of a national bank of the United States, or as being ''instrumentalities'' of the federal government in any way; and, of course, since the taxing section of the National Bank Act is not in force in the Philippines, it does not affect or limit in any way the taxing powers granted by the Congress to the Philippine Legislature by the Organic Act. So far as this case is concerned, it is as though neither the National Bank Act nor the Federal Reserve Act had ever been enacted. Those banks at Manila and Cebu stand before the Philippine government in precisely the same situation as though they had been established there by a bank chartered under the laws of the State of Iowa, or of Illinois, or of New York,—or of the Province of Quebec, or the Dominion of Canada.

IV

Respondent's only direct attempt to answer our position

that neither the National Bank Act nor the Federal Reserve Act has ever been extended to the Philippine Islands, is contained in its statements (*Brief*, p. 15) that the Federal Reserve Act contains authority to establish branches in "foreign countries *or dependencies* of the United States", amended by the amendatory Act of September 9, 1916, to read "foreign countries or *dependencies or insular possessions* of the United States", in those general words,—omitting any reference to the Philippine Islands,—as we have already pointed out (*Petitioner's Brief*, pp. 28-33); and that (*Respondent's Brief*, p. 16) the Philippine Islands were ceded to the United States by the Treaty of Peace with Spain, and are, of course, in the general category of "dependencies or insular possessions" of the United States; from which respondent concludes baldly (*Brief*, p. 17) that:

> "By the expression 'foreign countries or dependencies or insular possessions of the United States' National Banks were authorized to open branches anywhere in the world outside of the continental United States;"

and that:

> "The petitioner's contention would require that this general grant of power should be restricted by implication so as to read 'in foreign countries or dependencies or insular possessions of the United States *except in the Philippine Islands*'. Such a limitation will not be read into a statute by the courts";

and then respondent proceeds to argue (*ib.* p. 17) that the fact that the Federal Reserve Board granted the license in 1930 to open these branch banks in Manila and Cebu, and that (as respondent says) the Comptroller of the Currency has required reports and makes examinations of them, "are administrative interpretations of the Federal Reserve Act which are entitled to great respect".

But all of that is simply an attempt baldly to ignore and to avoid answering the arguments contained in Point I (pp. 11-34), and particularly in sub-paragraphs A (pp. 12-14), D (pp. 16-18), G, H and I (pp. 24-27), and K and L (pp. 28-33), and in Point V (pp. 44-46) of our brief, which conclusively show that the Congress has in fact never extended the Federal Reserve Act to the Philippine Islands, and that it has never been in force there, any more than the National Bank Act, or any other general statutory law of the United States which the Congress has not chosen to extend to the Philippines. Respondent attempts no direct answer to those arguments. It does not question the correctness of our premises, nor directly question the soundness of our conclusions. Respondent merely says, as above quoted, that petitioner's contention "would require that this general grant of power" to the Federal Reserve Board to grant licenses to establish branches of national banks in "dependencies or insular possessions" *"should be restricted by implication"*, so as to read "dependencies or insular possessions of the United States *except in the Philippine Islands"*, and that *"Such a limitation will not be read into a statute by the courts"*. (*Italics supplied*)

But respondent here wholly ignores the plain facts pointed out in our brief (pp. 12-27) that the Congress itself, both by Section 5 of the present Organic Act for the Philippine Islands and by Section 1 of the previous Organic Act, the "Foraker Act" for those Islands, has expressly directed that that very limitation be read into every general Act of Congress which does not "specifically" provide that it shall apply to those Islands. And respondent attempts likewise cavalierly to dispose of the opinions of the Attorney General applying that rule of interpretation of the Congress itself to the Volstead Act, to the Narcotic Drugs Import and Export Act, and to the National Industrial Recovery Act, and holding that because of it they did

not run to the Philippines (*our brief*, pp. 23-27) by saying only (*Respondent's Brief*, p. 18):

> "The various rulings of Attorneys General, cited by petitioner, that certain sumptuary and regulatory Acts of Congress, such as the Volstead Act, the Narcotic Drugs Act and the National Industrial Recovery Act do not extend to the Philippines also have no bearing on those questions."

Of course it is just immaterial whether or not those Acts are, as counsel call them, "sumptuary and regulatory", or whether they related to finances, or to imports, or whatnot. The Attorney General's opinions were not at all based on the character of the particular Acts, but solely on the ground that the Congress had directed that none of its general Acts should apply to the Philippine Islands, unless it had itself "specifically" so directed.

Respondent admits (*Brief*, pp. 17-18) the correctness of the statement in our brief (pp. 30-31, 32) that during all the years since the first enactment of the Federal Reserve Act in 1913, up to the year 1930, when the license was granted to this respondent for these "branch" banks in Manila and Cebu, the Federal Reserve Board had never granted an application for any branch of a national bank in the Philippine Islands. But respondent says that the force of that fact, as a contemporaneous administrative construction of Section 25 of the Federal Reserve Act as not running to the Philippines, is broken (as respondent claims; brief, p. 18) by

> "the further fact, stated by petitioner (Brief, p. 32), that no such application was made to the Federal Reserve Board prior to the respondent's application in 1930."

Passing by the fact that we fail to find any such statement either on page 32 or elsewhere in our brief, it seems

wholly immaterial whether any such application was ever made to the Federal Reserve Board, or not. If none was ever made, then that would seem rather to add to the weight of the argument that it was the unanimous contemporaneous interpretation of the Act,—and that it was so understood by the banks themselves, as well as by the Board,—that the Congress did not intend Section 25 of the Act to apply to the Philippines.

V

Respondent also says on page 17 of its brief that:

> "*No reason is suggested* why the Philippine Islands alone, of all the places subject to the jurisdiction of the United States, should be deprived of the services of National Banks." (*Italics supplied*)

This is again an attempt to overlook and to ignore everything said in our brief as to the purposes and the policy of the Congress with relation to the Philippine Islands, from the very beginning of the American occupation, as to the differentiation of their status from that of the Territories and from that of the other insular possessions of the United States, and particularly with reference to the separate financial policy for the Philippine Islands, the separate coinage and currency laws, the separate monetary unit, and especially the creation and fostering of the separate government bank for the Islands, formerly the Agricultural Bank, now the Philippine National Bank, the income on whose capital stock the Congress specifically authorized the Philippine government to guarantee (Act of March 7, 1907, c. 2908, 34 Stat. 1282; Appendix I to our brief, pp. 52-53), and of which the stock is almost entirely owned by the Philippine government, and which, as pointed out in our brief (pp. 30, 40), is "a truly national bank for the Islands", "an arm of the Philippine government" a governmental agency in a much more real and substantial

sense than are the national banks of the United States (Brief for petitioner, pp. 30, 31-32, 40, 42-43, and Appendix III, pp. 71-79). That room was filled. No other governmental banks were needed there, in the opinion of the Congress.

Respondent ignores all of this; attempts no answer.

VI

Respondent says (Brief, p. 16):

> "This Court has held (*Talbott v. Silver Bow County*, 139 U. S. 438, 443; *Domenech v. National City Bank*, 294 U. S. 199, 204) that Congress intended 'to create a national banking system coextensive with the territorial limits of the United States', and this Court held, in the *Talbott* case, that the National Bank Act extended to the territories, although they were not expressly mentioned in the Act";

but respondent forgets that in both of those cases this court was talking about Territories or an insular possession to which, by the express Act of Congress, the general laws of the United States not locally inapplicable had been extended, so that they ran there with the same force as within the States. In the *Talbott* case, the Territory of Montana, to which both the Constitution and the general laws of the United States ran, so that it was fully "incorporated" into the Union (Organic Act for Montana, Act of May 26, 1864, c. 95, Sec. 13, 13 Stat. 85, 91, Petitioner's brief, Appendix II, p. 70; and Section 1891 of the Revised Statutes of 1873 and 1878, our brief, pp. 20-21, 47); and in the *Domenech* case, Puerto Rico, to which this court there held that the National Bank Act as well as the Federal Reserve Act ran, by virtue of the provision of Section 9 of the Organic Act for that Island (Act of March 2, 1917, c. 145, 39 Stat. 951, 954; Petitioner's brief here, Appendix V, p. 87) that the statutory laws of the United States not

locally inapplicable "shall have the same force and effect in Puerto Rico as in the United States, except the internal revenue laws".

Here again respondent is simply attempting to ignore the whole distinction between the status of the Philippine Islands on the one hand, and that of the Territories and other possessions of the United States on the other hand, and the purposes and the policies of the Congress underlying the distinction. As noted in our brief (p. 28, footnote 13), the Congress has not extended that "national banking system" to the Philippines. It established another system there, a government bank, now the Philippine National Bank.

VII

Respondent (*Brief*, pp. 7-8) questions the correctness of our statement on page 35 of our brief that:

> "The presumption that a derivative sovereignty is not intended to tax instrumentalities of the superior sovereign, is after all only a rebuttable presumption; and, like other rebuttable presumptions, is to be used only as an aid in arriving at the true facts,—here as an aid in arriving at the real intent of the Congress",

and contends (*Respondent's brief*, Point "Second") that

> "The respondent, being a government instrumentality, is not subject to taxation by States *or dependencies, unless the power is expressly granted by Congress*". (Respondent's Heading, Point "Second", p. 7; *Italics supplied*).[1]

[1] But the respondent says, contradictorily, (*Brief*, p. 3) that,

> "The question whether there is any implied prohibition against the taxation of branches of a national bank by the Philippine government is not involved."

As applied to the present case, that statement carries the unwarranted assumption that the banks here involved in Manila and Cebu, upon which the Philippine government levied these taxes, are actually "national banks", or that they are, within the meaning of Section 25 of the Federal Reserve Act, actually and legally branches of the respondent, as a national bank of the United States; which they are not, because Section 25 of the Federal Reserve Act does not apply to the Philippines, and never did. Those banks in Manila and Cebu do not in reality exist by reason of any authority derived from their supposed license by the Federal Reserve Board under that Act; and, therefore, they are not, in any legal sense, "government instrumentalities" of the United States, or statutory "branches" of the respondent as a national bank of the United States in such a sense that the Philippine levy of taxes upon them should be treated as a levy of taxes on the respondent itself.[2]

Of course if the taxing section of the National Bank Act really ran to the Philippines, then as we have already noted (*ante*, III, p. 4), the express limitation which it contains would restrain the general taxing power given the Philippine Legislature by the Organic Act, and that limitation could be removed only by act of Congress, either expressly so providing in so many words, or else carrying a clear implication of the intention of the Congress to remove the limitation.

[2] What the private business relations between the respondent in New York and these Manila and Cebu banks may be, is wholly immaterial here. We are concerned only with the legal status of those so-called "branches", and with their relations to the Philippine government. For the purposes of this case, it is enough to know that they are not legally "branches" of a national bank of the United States under Section 25 of the Federal Reserve Act; and, therefore, are not entitled to the privileges of statutory "instrumentalities" of the federal government.

But that has nothing to do with the situation here involved, where, the taxing section of the National Bank Act not being in force in the Philippines, there is no federal statute in force there limiting the general taxing power of the insular government, either over Philippine branches of national banks of the United States or over any other banks in those Islands, except the provision of Section 3 of the Organic Act that "the rule of taxation in said Islands shall be uniform". (Point II, pp. 33-34, of our brief). The sentence which respondent quotes (*ante*, p. 10) from page 35 of our brief is a part of our statement of our position in support of Point III (pp. 34, *et seq.*) of our brief, that, in the absence of any such express limitation by the Congress upon the general power of taxation given to the Philippine Legislature by the Organic Act, "*There is no implied prohibition preventing the Philippine government from levying these taxes, or collecting them.*" Respondent's position, to the contrary, is that, even under such circumstances, there is implied an absolute prohibition which can be removed only by express language in an Act of Congress. In taking that position they appear to confuse the rule,—and the reasons for the rule,—relating to the sovereign States, with the rule relating to the Territorial or insular governments which are themselves only instrumentalities of the Congress (*Farmers Bank vs. Minnesota*, 232 U. S. 516, 524), wholly subject to its will and to be directed wholly by it in any way the Congress may see fit at any time, whether by express direction in so many words, or by necessary implication from its Acts. So that, as is said on page 35 of our brief:

> "It comes back, therefore, to the question, simply, what was the intention of the Congress?"

As we have said, respondent appears to confuse the character of the Territorial or insular governments with that

of the sovereign States. Respondent says (*Brief*, p. 8)

> "The inability of a state, territory or dependency to tax the instrumentalities of the sovereign is not based upon *presumption*, but is due to a complete lack of capacity to tax such instrumentalities. The power to tax is a power to retard, impede, burden or destroy; and, since *M'Culloch v. State of Maryland* (4 Wheat. 316), it has been the law of this country that states or dependencies cannot tax National Banks, since they are instrumentalities of the United States Government" (*Italics respondent's own*);

and that (*Brief*, p. 9):

> "While that principle was originally declared only with reference to the States, *it was later extended to the territories*" (*Italics supplied*),

citing to that last statement, as to the territories, *Talbott v. Silver Bow County*, 139 U. S. 438, 441.

BUT IN FACT THE TALBOTT CASE HOLDS EXACTLY TO THE CONTRARY. *It holds, directly, that the taxing power may be given to the Territory, an instrumentality of the Congress, by implication, and may be implied in an appropriate case from lack of express prohibition against it, in connection with the general grant of taxing power to the Territorial legislature.* Precisely the rule upon which we rely here. In that case this court upheld a statute of the Territory of Montana providing for an *ad valorem* tax upon all property in the Territory, and held it applicable to a national bank organized in the Territory. The same argument appears to have been made there against the validity of the Territorial statute that the respondent makes here, viz., that it was not supported by any "express" grant of power by the Congress to the Territorial Legislature to tax national banks, and that they were instrumentalities of the national government, and hence protected by the

same rule of inability to levy any tax upon them which Chief Justice Marshall had laid down in *M'Culloch v. Maryland* as depriving the sovereign States of any power to levy such taxes. But this court replied (*Talbott v. Silver Bow County, supra,* 139 U. S. 438, 445-446):

> "But the argument does not rest here. Upon what principle is the power of a State to tax a national bank, without the consent of Congress, denied? The answer to this question was fully given by Chief Justice Marshall in the cases of *McCulloch v. Maryland and Weston v. Charleston, supra.* Briefly stated, the argument was this: Two distinct sovereignties, the State and the United States, exercise jurisdiction within the same territorial limits. Each has the power of taxation. This power is in its nature absolute and unlimited. Power to tax is power to destroy. Given to the State the power to tax any of the instrumentalities which the United States creates for the exercise of its jurisdiction, and the former may impede, if not wholly stop, the latter in the discharge of its duties as sovereign. Hence, by necessary implication, the absolute exemption from state taxation of any of the instrumentalities —and among them are national banks, which the United States creates for the exercise of its powers and the discharge of its duties. **But the whole argument fails when applied to a Territory.** It is not a distinct sovereignty. It has no independent powers. It is a political community organized by Congress, all whose powers are created by Congress, and all whose acts are subject to Congressional supervision. Its attitude to the general government is no more independent that that of a city to the State in which it is situated, and which has given to it its municipal organization. **Who would contend, in the absence of express legislative provision therefor, that a bank created by or under the laws of a State, and located and doing business in a city of that State, could claim exemption from municipal taxation upon its property? A bank is an institution organized for private business, and with a view to individual profit, although it may serve**

> **a public purpose and such public purpose justify its creation; and no such private corporation has any implied exemption from local taxation by a municipal or political organization in which it is situated.** The only ground on which exemption from such taxation can be based, in the absence of express legislative provision, is that the tax proceeds from a distinct and independent sovereignty. As the reason for the rule of exemption of a national bank from state taxation fails in respect to a bank located in a Territory, the rule also fails."[3]

The rule stated in Point III (pp. 34 *et seq.*) of our original brief is correct. Respondent fails to notice that we have there already replied in effect (pp. 35-36) to what respondent now says (*Brief*, p. 9) in relation to the effect of the decision of this court last February in the Puerto Rican case of *Domenech v. National City Bank*, 294 U. S. 199. Respondent contends (*Brief*, p. 9) that this court held in that case, in effect,

> "that the insular possessions and dependencies of the United States have no power to tax national banks un-

---

[3] It is true that in that case this court also upheld the Territorial statute of Montana on another wholly different independent ground, viz., that the taxing section of the National Bank Act ran also to the Territories and, therefore, constituted an express grant of power to the Territorial Legislature to levy the tax in question (*Talbott v. Silver Bow County, supra*, 139 U. S. at pp. 441-445). But that fact does not militate in any way against the authority of that portion of the decision above quoted, resting on the separate second ground (*supra*, at pp. 445-446). The conclusion of this court was rested upon *both grounds*. The court's conclusion was (at p. 446):

> "*From these several considerations* we conclude that there was no error in this ruling of the Supreme Court of the Territory of Montana, and that the same power of taxation in respect to national banks exists in the Territories that does in the States." (*Italics supplied*)

> less that power has been *expressly* conferred by Congress". (*Italics supplied*).

But, of course, as pointed out in the quotation from that case (at p. 205) on pages 35 to 36 of our brief, this court was there careful to state that in that case, in relation to Puerto Rico,

> "we are confronted by R. S. 5219" (*the taxing section of the National Bank Act*), "which *proprio vigore* extends to Territories, and the Congressional declaration that it, like other statutes of the United States shall, if not locally inapplicable, apply to Puerto Rico".

That marks the differentation.

VIII

Respondent contends (*Brief*, p. 14) "The respondent is actually in the Philippines, doing business under a permit granted by the Federal Reserve Board", and that: "If the respondent has exceeded in any way the powers granted to it by law, the remedy provided by the National Bank Act (R. S. Sec. 5239, 12 U. S. C. A. Sec. 93) is 'a suit brought for that purpose by the Comptroller of the Currency in his own name' in a district or territorial court of the United States".

But (1) That section of the National Bank Act has not been extended to the Philippines, any more than any other parts of that Act. (2) In any event, that statutory remedy is only for cases where the directors of a validly existing national bank of the United States have caused or permitted some violation of the provisions of the National Bank Act, subjecting the bank to forfeiture. This is not such a case at all. The question here is whether or not these Manila and Cebu banks are entitled to claim any rights whatever, or any existence, either under the Federal Re-

serve Act or under the National Bank Act. And (3) Respondent is evidently thinking of this case as though it were a prosecution of the bank by the Philippine government; whereas the reverse is true. This was an action brought by the bank itself (Complaint, R. 2-7) against the Collector in his official capacity, — substantially a suit against the Philippine government itself (*Smith v. Reeves,* 178 U. S. 436, 438-440), which is at least *quasi* sovereign (*Porto Rico vs. Rosaly,* 227 U. S. 270, 274-277),—to recover from it, as defendant, taxes alleged by the plaintiff bank to have been improperly paid. In defending itself the Philippine government is, of course, entitled to show in its defense that it does not owe the money, because these Manila and Cebu banks are not in reality "branch banks" existing under Section 25 of the Federal Reserve Act or any other federal law; and, therefore, are not entitled to the privileges of "instrumentalities" of the federal government. For such a defense, the Philippine government does not have to travel the round-about route of a suit in *quo warranto.*

CONCLUSION

The judgments of the Supreme Court of the Philippine Islands and of the Court of First Instance of Manila should be reversed and the case remanded with directions to dismiss the action at the plaintiff bank's costs, for the reasons stated in the brief for the petitioner.

Respectfully submitted,

WILLIAM CATTRON RIGBY,
Attorney for Petitioner.

SERAFIN P. HILADO,
Solicitor-General of the Philippine Islands,
Of Counsel.